

### The concept of the State of Law

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Veröffentlichungsversion / Published Version

Zeitschriftenartikel / journal article

#### Empfohlene Zitierung / Suggested Citation:

Oniszczyk, J. (2015). The concept of the State of Law. *Studia z Polityki Publicznej / Public Policy Studies*, 2(2), 57-77.  
<https://doi.org/10.33119/KSzPP.2015.2.3>

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## The concept of the State of Law

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### Abstract

Political systems of various states are currently described as the rule of law states, law-abiding states, democratic states ruled by law, lawful states, or law-governed states? Mostly, it is noticed that the states ruled by law are characterized by the fact that the power is exercised by the set of abstract principles which govern the conduct of all people (a general norm) by equal rules, in opposition to the state governed by people (the order of an individual or group of individuals). Such a state acts on the basis of law and within its limits. The above statement corresponds with the apprehension of the law-abiding state. The law observing state is formally characterized by functioning on the basis of, and within the limits of law whereas its substantial dimension means that the law is equal (equal for everyone). This description is not sufficient to characterize the rule of the law state. It is only a fragment of even broader concept of the democratic state ruled by law.

**Keywords:** democratic state ruled by law, rule of law, legitimacy, legalism, rule of law, law-abiding state principles, the principle of trust in the state and the law.

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### Pojęcie państwa prawnego

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#### Streszczenie

Współcześnie ustroje wielu państw są opisywane jako ustroje państw prawnych, praworządnych czy demokratycznych państw prawnych. Zwykle zauważa się, że cechą państwa prawnego, inaczej niż w wypadku państwa rządzonego przez ludzi (np. rozkaz jednostki), jest to, że władzę sprawuje system abstrakcyjnych reguł, które kierują postępowaniem wszystkich ludzi (generalna norma) na jednakowych zasadach. Takie państwo działa na podstawie i w granicach prawa. Powyższe stwierdzenie odpowiada w zasadzie pojmowaniu państwa praworządnego. Państwo praworządne formalnie cechuje bowiem działanie na podstawie i w granicach prawa, zaś jego wymiar materialny oznacza, że prawo jest jednakowe (równe) dla wszystkich. Opis ten nie wystarczy dla scharakteryzowania państwa prawnego. Jest więc też tylko fragmentem opisu jeszcze szerszej koncepcji, jaką jest demokratyczne państwo prawne.

**Słowa kluczowe:** demokratyczne państwo prawne, porządek prawny, praworządność, legalizm, zasady państwa prawnego, zasada zaufania jednostki do państwa i prawa.

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Novum such as the authority of law (the rule of law) turned out not to be a real authority of a general norm, with omission of authority of people in the legislative as well as executive sphere. The specialty of such an approach is indicated in descriptions of legislative and executive legal practice. Normativist, Hans Kelsen pointed out a lot of fictions as regards practice of making and applying law. According to his opinion, “actors” who play religious and social roles, after taking off masks, deprived of their attributes of power, appears solely as people who are oppressive to others and having their own interests. Therefore, the legal decisions are not only a matter of general formal “logic” or matter of a standard of minimal guaranties of human freedoms and rights. Realists indicate that the pure rational legal logic is insufficient for the legal settlements in a sphere of legal practice. According to Susan Haack<sup>1</sup> (who represents pragmatic movement and who followed path of Oliver W. Holmes but also Charles S. Peirce and William James), it is important to moderate between pure legal logic and extreme, cynic legal realism which find judgments to be results of discretionary authority of a judge.

## Formation of the vision of the state ruled by law. Comprehension of law in a state of law

### Formation of the concept of the state ruled by law

The vision of a rule of general (common) and equal law was not suddenly invented in a contemporary democratic state ruled by law but it is rooted in early stages of the state development. The basis for the foundation of the practice of a lawful state appeared in ancient times. For instance, Cicero deliberated over the Roman Republic. Later, certain significance for the formation of the vision of legal state appeared in thoughts of Middle Ages Christian philosophers. For instance, in the vision of Thomists, the man appears as a point of reference for the state and social harmony.

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<sup>1</sup> S. Haack, *The Pluralistic Universe of Law: Towards a Neo-Classical Legal Pragmatism*, in: *Law and Legal cultures in the 21<sup>st</sup> Century. Diversity and unity*, eds. T. Gizbert-Studnicki, J. Stelmach, Wolters Kluwer, Warsaw 2007, p. 104.

In this vision the state and the law are to support man's innate instinct for seeking the good. The concept of nominalist, W. Ockham departs from the Thomists' idea of the relation between human nature and the absolute. The base for the legitimacy of law is a condition of formal (procedural) correctness. Therefore, it is a different ground for lawfulness than the justifications based on fairness i.e. the harmony with the natural law. Conceptions, according to which the form and logical quest are important with reference to the state and the law, result in emancipation and collectivization of the state. When the human (statutory) law is not subjected to the natural law ("*instinctus rationis* of human nature") the man's settlements are possible to be made by unlimited voting, since the Christians' concepts of limitation on demarcation and politics, were questioned<sup>2</sup>. In any case, the concept of the rule of law was influenced by the critic of the prior methods of governance and later by the enlightened and modernistic vision of the world. The new concept was inspired by the mechanical regularity and accuracy of the natural science or rationality of the logical and mathematical quest.

The concepts of: Grotius, Hobbes, Locke, Sidney, Montesquieu, Rousseau, Mounier, Condorcet, Constant, Guizot, Pufendorf, Thomasius, Wolf, Kant, and Hegel are especially important for the improvement of the vision of modern rule of law state. The formation of a current vision and practice of a rule of law state or law observing state happened in 18<sup>th</sup> century and it was related to the improvements of Enlightenment as well as of industrial revolution (modernism). This concept included the objection against states of feudal origin, especially in its absolutist dimension (the arbitrary authority in the social relations and in relation to a man). The rule of law state was to be characterized not by free and unlimited authority exercised by the people but by the authority exercised by the state bodies which were to act based on law and with the use of means (forms) prescribed by the law. In opposition to state bodies which were allowed to act only according to law (legal permissions), people could do whatever was not forbidden (or prescribed) by the law. The compliance with law was meant to be secured by specially established institutions. The characteristic of a rule of law was the authority of law, not people.

The enlightenment quests affected the positivist vision of society and a new role of a man as a citizen who is responsible for the state's law. This man was equipped with dignity, a free will and as an "adult" he was reluctant to the paternalistic and justified by metaphysics and absolute power, authority of other, "more perfect" people. The law which was a result of the order and will of monarch is replaced with the will of the sovereign nation which is expressed in the form of regulation (legal act). The classical judge from the time of Enlightenment becomes a "mouth of a legal act". However,

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<sup>2</sup> J. Staniszkis, *Niespełnione marzenie* [Unfulfilled dream], "Rzeczpospolita" 2005, February 26–27, p. A6.

the science which shaped the new, non-metaphysical background for the authority of law, did not provide an answer for the question of how to form a law in the future so the technically corrected regulations (sound form) have a content which grasps human relation in justified and an efficient way (sound spirit). In other words, a new modern-positivist mechanism of creating, exercising and interpreting the law (transition of regulations into norms) did not offer the only goal of the enactment. In fact, it could not offer the only type of rationality and hierarchy of values. This turned out to be a matter of a political practice and in case of demarcation – a matter of public debate and legitimized political decision.

There is no sole, agreed “standard” of the lawful state. The deliberations are mostly related to the character of a model example of the rule of law i.e. whether it is formal or substantial. Many times the literature highlights the fact that this vision, in its strict sense, has formal (procedural) character. It is so because the conditions, which have to be fulfilled in order to determine whether the society is governed by the law (regulations) or by the individual, are very important. The contemporary vision of the rule of law state, except the lawfulness in the strict sense, captured also the substantial side of such a state.

The definition of the term, lawful state (rule of law) was in large degree formed by Robert von Mohl who referred to liberal vision of the state and social contract in the spirit introduced by John Locke. Long time ago, the literature (e.g. R. von Mohl) expressed a doubt whether it is possible to establish such a state based only on the common agreement of parties of a social contract. Some 19<sup>th</sup> century speculations over the rule of law state, among others directed the attention to the possible mistakes, which may occur during the formation of such a state, e.g. such a state is established by the violent means, without approval of the people and “sufficient and higher authority”. It can also be an effect of unawareness of people as to the goals of the state and its means, without fulfillment of the conditions justified existence of the state, finally when the new organization of the state does not serve to the life goals of people. Mostly, Mohl highlighted the importance of goals and claims of individuals for the recognition of the rule of law (or lawful) state but also existence of the conscious will of the people and agreement among them. The duties of such a state are to: 1) secure a legal order “as a thing good by its nature” and as a base for every action 2) “support reasonable endeavors of people when their individual or organized acts are not sufficient<sup>3</sup>. In this vision the legal state “may not have a different purpose but: to regulate the life of a whole nation so that every member is supported and protected in free and comprehensive usage of all of his powers (...) Man’s freedom is in this

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<sup>3</sup> R. von Mohl, *Encyclopedia of political skills*, Liber, Warsaw 2003, pp. 88–89, 99, 100, 279–284.

vision a superior rule, (...) the state's support may be only of negative character and must be based on removal of obstacles which are too difficult to be removed by an individual. (...) The only purpose of the whole state is to protect the freedom and make it possible". The state is here a measure which serves to a human being, not the opposite<sup>4</sup>. In the 19<sup>th</sup>-century studies, the concept of separation of the law from morality appeared in the jurisprudence<sup>5</sup>.

The problem is still a relation between the form of the system and the rule of law (lawful) state. According to Mohl's vision, "from the purpose of the lawful state one cannot implicate the form of the government" but he admitted that "legally, every form of state's authority is acceptable if only its supports the goals of human life". In this vision, the practicality was to determine the form of the state. Therefore, the legal state may have a form of the classical (direct) or indirect democracies (the authority of the people). The fundamental base of the rule of law state was expressed in fact that those who exercise power "cannot act utterly arbitrarily and change or limit the general rules of the rule of law state". Criterion of such a state is subjection of all people to a statutory law. For this reason e.g. despotism is not a form of a rule of law state since it is based on a compulsion of an authority of an individual, who is interested solely in fulfillment of his own will where the rights of citizens are not obeyed. That is why, the power of people was not founded to be the only possible, justified or right form of rule of law state. This opinion was implied from the assumption that the rule of law state is to fulfill the "collective interests of people". Therefore, the form of government, such as democracy, is only a measure to reach this goal. In that case, it is a reasonable opinion that the other forms of government are also justified but only as long as they are able to achieve the social goals. This justification would be better if the government was more useful<sup>6</sup>.

## Comprehension of law in the concept of the state of law. Legal order

The understanding of law has a significant meaning for the traditional concept of the rule of law state. The law is viewed in positivist way as a hierarchical set (system) of general (universal) abstract norms, which is derived from legally approved state

<sup>4</sup> Opinion of R. Mohl, cited in the A. Bosiacki's Preface to the *Encyclopedia of political skills* by R. von Mohl, ..., p. XXX-XXXII, XLVIII, also p. 200.

<sup>5</sup> R. von Mohl, op.cit., p. 169.

<sup>6</sup> Ibidem, p. 284-286, 314.

authorities. The normative act, for example, the statute of Parliament, establishes norms of general and abstract nature (legal norms).

These law norms are contained in a lawmaking act, first and foremost in independent lawmaking acts – statutory act. This act (statute) “sets rules and models of conduct, the addressees of which are legally bound to observe regardless of the legal foundation of their enactment, regardless of their subject matter, scope or the range of persons affected by them or the sanctions ensuring their observance”<sup>7</sup>.

Under the rule of law, the law is a phenomenon that is, to a great extent, autonomous of the state as an organization implementing defined political tasks and it should not serve to bring to life political or economic objectives in a manner that may depreciate the role of the law and its acceptance by society. The use of the law as an instrument for implementing economic objectives, encompassing cases of economic difficulties, necessitates the observance of constitutional principles in force for creating law. Inter alia no state of superior economic need may serve as a basis for adjudication in matters of the constitutionality of legislation<sup>8</sup>.

In the traditional view of concepts of rule of law in the state the law is understood as: (1) the sovereign will of the equal citizens (people, nation) expressed in (2) the set of general and abstractive norms which is (3) characterized by the fact that such norms constitute system, i.e. they are characterized by the vertical non-contradiction, horizontal coherence and completeness. (4) Mentioned will is expressed by the legal act which usually has a form of a written text, (5) which consist of regulations including: principles, ordinary norms, organizational rules, administrative directions. Based on the interpreted legal norms (6) the individual rule of conduct, relevant to the specific situation is determined. Traditionally, the formula of the authority of law is based on acceptance of 1) primacy of the parliamentary act 2) the law as an uniformed system of norms, 3) necessary coherence between executive general sources of law (e.g. ordinances of administrative bodies) and acts, 4) differentiation of meaning of: a) principles, b) so called ordinary rules c) organizational rules, d) other normative indications, administrative directions. In the rule of law state, may be binding only “will” of the one coherent within the system norm of conduct, which is adequate for the specific social situation. Finally, the law in the rule of law state should fulfill some formal conditions which guarantee its certainty such as: conduct *pro futuro*, relative permanence, synthetic character or the certainty of acquired rights.

<sup>7</sup> W. Zakrzewski, *Zakres przedmiotowy i formy działalności prawotwórczej* [The Subject Matter and Forms of Lawmaking Activity], Warsaw 1979, p. 18.

<sup>8</sup> J. Oniszczyk, *A Selection of The Polish Constitutional Tribunal's Jurisprudence from 1986–1999*, Trybunał Konstytucyjny, Warsaw 1999, p. 59.

Described law is typical for the rule of law state in the formal comprehension. Conventionality of the form and process of creation of law appears as a formal and legal problem even when the normative content is a substance of law which is a regulator of social relations. Such content may be continually and completely freely created, but it may also be created with consideration of certain substantial content – the standard of freedom and human rights. This component is a second, necessary wing of the rule of law state. Such a project of the rule of law state expresses a certain level of formal and substantial expectations. In case of substantial requirements there is located the system of values with which the legal acts must comply. Differently from the law observing state, which governs and is governed by the legal acts, in case of the rule of law state appears the necessity of compliance with certain level of formal and substantial requirements which come out from so called standard of the freedoms and rights of a human<sup>9</sup>.

The social order is very often defined as a set of various relations which enables the lasting social connections. Therefore, the order in which the man appears is mostly formed by the social rules. These rules, which are established or approved by the state, form the social order described as a legal order. This order refers to certain vision of the social order. It is a part of the social order. The law appears as an important element of the formation of the social order along with other factors like morality or various beliefs. The different legal systems have been created with the participation of the state (international law), or so called supranational law. Finally, the social law appears which is recognized by the state in collective labor contracts or so called *lex Mercatoria*.

The social character of law is seen as a sign of its descent from the state, viewed as a social organization which carries out the values of social importance. The social character of law is influenced by the fact that it results from the process which takes place in the large social group, which is a state. It is admitted that the law is to express, not only certain values and interests, but also to produce certain conduct of people. Broadly speaking, it is often asserted that the norms indicating the models of conduct of a man are formed to secure certain values. Among such values there are ones which are derived from the basic biological needs e.g. life and health as the highest value of the man. Also, the man's conduct and interests are a real premise of formation of law. The social structures of different character also influence creation

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<sup>9</sup> For example the previous Decisions of the CT have already enhanced the belief that the democratic rule of law also covers certain substantive matters, in particular those related to individual rights and freedoms. That line of reasoning led to the inference from constitutional principle of democratic state ruled by law of such aspects for the legal status of an individual's access to courts, the right to dignity and the right to life, right to private life. See: J. Oniszczyk, *op.cit.*, p. 207.



of law. The law has to secure the basic biological needs of a man as well as secure his safety and freedom to provide him with circumstances to cultural improvement. The law is not only to protect (preserve) the values important for the man but also is to influence formation of new standards of conduct, which aims to increase the confidence of people to the law and the state, which enacts it. In other words, except for goods which are important for a man from biological point of view, a man has also other needs important for his existence. They are related to the sphere of culture in which he lives. Surrounding environment influences a man but also man has an impact on different cultural occurrences. Within the norm of conduct appear some issues which are important from the legislator's point of view, i.e. legislator's needs, opinions and interests. The knowledge the legislator has about the man and the world is reflected in these things. The legal norm of conduct is then a rule distinguished from many different psychophysical acts of people and it gives the direction for a desired action. Aforesaid inclusion of the significant social values within the content of legal norms is interpreted as an institutionalization of these values ("transition to a social practice")<sup>10</sup>. The state law, generally speaking, should express and protect the interests and values important from the state's and man's point of view (democratic state ruled by law). Besides this justification, the legal norm is determined by social securities in a form of the state's guaranty to fulfill the norm. According to above presentation, the legal norm, which is an important verbal phrase, is formulated as a social fact meaning that the rule "is purposefully created by people who aim to achieve socially determined goals"<sup>11</sup>. Traditional depiction of legal rule in a social character introduces it as a type of a social norm which: 1) is derived from the strongest social organization, a state, which has monopoly on power, 2) compliance with it is necessary in order to avoid state's compulsion, 3) its formation is not depended on the decision of entity which is obliged to exercise law or of other subjects, 4) it expresses only the will of the state, 5) it appears only in form determined by the state, 6) it fulfills the necessary minimum of the substantial requirements (e.g. justice, human rights).

The rule of law within the rule of law state (law governed state) does not refer to the law but to the legal order. The issue is the circumstances of the legal order in the society directed by the vision of the rule of law state. There is not the only agreed model of the rule of law state. Therefore, the deliberation over the condition of the rule of law state is mostly supported by some concepts. As may be recalled here, a significant example saying that the social order, based on the rule of the law state, should fulfill certain condition on the political, social and economic level.

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<sup>10</sup> S. Ehrlich, *Norm, group, organization*, Warsaw 1998, p. 35.

<sup>11</sup> J. Wroblewski, *The rules of formation of law*, Warsaw 1989, p. 7, 8.

The first case is about “the civil right, based on the rule of the majority, to choose the legal system with the guaranty of the legal and factual possibility for existence of legal and organized opposition and peaceful change of governing group”. On the other hand, the social level assumes the existence of basic rights and freedoms of citizens including freedom of speech and assembly as a foundation of a social system. Finally, the economic condition means that the foundation of the economic system is the private property and a free market. In addition, it is expected that this order should provide for existence of civil society<sup>12</sup>. Law, in such a political system, results from the democratic social contract. It regulates certain level of man’s rights, rules for exercise of power, its scope, permissible intervention of a state in the rights of individuals (e.g. based on the rule of common good), exercise of the citizens’ control over the public authority, existence of system of expression of interests for different individual as well as collective subjects, procedures and forms of creation of law, selection of authorities.

## Legality in the state of law. Governing by the rule of law. Principle of legalism

### The meaning of legality

1) Legality in the rule of law state is associated with the situation of guaranteed legal order. The term legality is commonly understood as compliance, in any situation, with law by different subjects such as natural persons, legal persons, agencies of local government or state bodies. In this case it is difficult to notice whether the term “legality” brings any new quality in relation to law and its order i.e. if the law guarantees the order. It is different when the legitimacy refers to the conduct of public bodies (governing) and is to express only exercising of power through the law by the governing bodies. The issue here is what “to govern” means. The term “govern” has different meanings. Generally speaking, it is a situation of governing activity, which in case of law means ability to constitute, exercise and execute law. In case of legitimate action of state’s bodies, it means that the acts of exercising and constituting law happen on a base of law and within its boundaries. The compliance with law is a basic duty of every state body and fulfillment of such a demand may determine legality.

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<sup>12</sup> L. Morawski, *The major problems of contemporary philosophy of law. The law in the stage of transformation*, LexisNexis, Warsaw 2005, p. 250 and next and recalled N.S. Marsh, *The Rule of Law as a Supra-National Concept*, in *Oxford Essays on Jurisprudence*, ed. A.G. Guest, Oxford 1961; R. Dahrendorf, *Endangered civil society*, in: *Europe and the civil society*, p. 236.

This requirement is described as a formal legality. The second form of legality also has been shown as substantial legitimacy. It results from the expectation that the law, especially when it comes to the basic social relations and human rights has to treat everyone equally. According to this vision of legality all citizens are equal before the law but also are subject to the same law. Such legality results in a duty to obey the law by the public authorities and in unacceptability of so called selective usage of law. Such an understanding of approach to the legality of the governing authorities was initiated by the enlightenment idea which was mostly supported by the concept of social contract, separation of powers and the right to property. This stance resulted in the idea of the limited ability of the government to invade in the sphere of rights and freedoms of individual and in belief that the government may act only within the borders designated by the law, which cannot be arbitrary.

One can add that the principle of substantive legality was interpreted as requiring that "law represent values reflecting the democratic nature of the State". One of the values (besides social justice, equality, humanism and democracy of law) related to the interests and will of the people, which law is to implement, is the requirement of social stability (constancy) of rights guaranteed by statutes and related to the legal safety of citizens<sup>13</sup>.

The legality is secured by so called formal and substantial guaranties.

Noncompliance with law by the state's bodies means to burden an individual (organization of individuals) with a variety of consequences, on the other hand it means to shift the responsibility for such a situation on the abstract subject (state). Since no one should benefit from the fact that the law is violated (no legitimate action) public bodies (specific subject exercising power) cannot, even if show compliance with the rule of extraordinary caution in the area of constitutional rights and freedoms of individual, free themselves from the obligation of returning goods (benefits) in the whole extent or from covering citizen's lost.

2) The term legal order does not tell directly how the rule of law should look like, this is indicated by the mentioned principle of legality. In case of the rule of people, the exercise of power by the means of law is only one of the forms of rule of people. In some legality states the rule may be based on directing on behalf of the state, one group of people by another. Although, the lawful state in which the "authorities" do not govern the society by means of law but the broadly understood law governs, is a state where the rule of law is present. In this case, we talk about the law, which not only has a formal and legal origin ("well born" in terms of form of an act and the procedure of enactment) and not only refers to the sovereign will

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<sup>13</sup> J. Oniszczyk, *op.cit.*, p. 33.

of the sovereign nation, people and so forth, over which there is no power. All of this is enough to justify the governing by law and replacement of this term with the term of rule of law state creates confusions. It may be qualified in one group, according to the form and the will of the sovereign, the law of the ancient tyrannies, democracies, the law in the form of Middle Age king's orders, or even parliaments of the contemporary totalitarian regimes or acts of the lawful state. However it will not designate the accurate qualification from the standpoint of law of rule of law state. This law represents a different quality.

## The principle of legalism

The principle of legalism derives from the concept of a rule of law state. In democracy it is expected that the authority is expressed in action of the state actors prescribed in legal regulations. The interpretations may be recalled saying that the rule of law state is characterized by the respect to the principle of legality, which is logically tied to the principle of legalism<sup>14</sup>. Other interpretations take directly the principle of legalism as a principle of legality (observance of law [the rule by law and based on law])<sup>15</sup>. Most often this principle is seen as a duty of all state's bodies to act based on law and within the limits of law. The duty of compliance with law concerns the bodies constituting and exercising law (administration, courts) and other bodies<sup>16</sup>. In other words, every body has to have authorization (legitimacy) in the constitution or regulations to act and has to introduce the legal base for its action. While in relation to a citizen such a base is duly proclaimed regulation which has universally binding power. From discussed regulation it is implicated that in opposition to individual, who is allowed to do anything which is not forbidden<sup>17</sup>, the state body must have a clear (not presumed) legal authorization to act, which includes the base for its existence as well as scope of its activity. Therefore, everything which is not allowed to the state's body by the law is forbidden. When it comes to the institutional mechanisms of protection of legality, the responsibility of the state for the damages caused by state's actors and ensuring the citizens access to the court. In any case, in the rule of law, the statutes are above the state and the "rule of law not of people"

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<sup>14</sup> W. Sokolewicz, *The Republic of Poland – democratic state ruled by law*, PIP 1990, vol. 4, p. 12.

<sup>15</sup> H. Izdebski: *Fundaments of the contemporary states*, Warsaw 2007, p. 107. According an article 7 of the Constitution: The organs of public authority shall function on the basis, and within the limits, of the law.

<sup>16</sup> Z. Witkowski, in: Z. Witkowski, J. Galster, B. Gronowska, A. Bien-Kacala, W. Szyszkowski, *Constitutional Law*, Toruń 1998, p. 65, 66.

<sup>17</sup> This rule was verbalized in the article 5, second sentence of the French Declaration of Rights of Men and of the Citizen from 1789 ("everything what is not forbidden is allowed").

is treated as a method of governance, whereas the bodies of a public authority are bound by the law. The principle of legalism has been treated herein as a principle of the formal legality (the body has to prove the legal authorization /legitimacy/ while exercising public authority)<sup>18</sup>.

In the older jurisprudence, Constitutional Tribunal stated that, the principle of the rule of law, and the principle of legalism give rise to the rule barring state bodies from establishing normative acts inconsistent with higher-ranking normative acts and the rule obligating each body to act solely within the limits of its legally defined powers. Every violation of the law by a state body, including a violation that occurs in the legislative process, at the same time constitutes a failure to observe the law. According to other examples of decisions of the CT, norms of law introduce a division into benefits which may be granted (optional benefits) by administrative body and benefits which must be granted if circumstances specified by law are met (obligatory benefits). Such rules should be classified, as entailing a delegation for an administrative body to act at its discretion. Making a final decision dependent on the discretion of such a body does not, however, mean complete freedom in granting the benefit. Administrative bodies established to provide aid are limited by the fairly precisely specified range of needs they can satisfy and by the funds at their disposal, but the final decision is both discretionary and constitutive. It is the administrative body that evaluates a specific event, and only after a positive decision is issued, one can talk of the person who is to be granted aid as a person eligible to receive a benefit. In accordance with the requirements of the democratic rule of law and pursuant to principle that "all state organs (...) shall operate on the basis of the law", no "free" acts (i.e. acts that are not subject to certain legal limits and to review) of the administration are envisaged. From a formal institution providing for the free and totally unrestrained ability to make decisions, free discretion is only transformed into a form of certain flexibility of the administration. Such a flexibility which enables and obligates suitable organs to examine all the circumstances of a given case in order to seek the most appropriate settlement reflecting the objective truth and the objective of such settlement. Thus, free discretion becomes a special form of implementing the provisions of the law in that the organ following the law is to take into consideration the individual conditions of each case. Its establishment is possible only to the extent that enables the organ to issue a decision in conformity with the intention of the lawmaker. Such operation of the administrative body must, however, be justified and must be subject to review. The allocation of goods should also be subject to a court

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<sup>18</sup> J. Sobczak, in: *Polish Constitutional Law*, eds. W. Skrzydło, E. Gdulewicz, M. Grant, G. Koksanowicz, W. Krecisz, R. Mojak, W. Orlowski, S. Patyra, P. Sadowski, J. Sobczak, W. Zakrzewski, Lublin 2005, p. 109.

review. It is commonly believed that the social importance of court review over the administration with respect to the distribution of goods does not necessitate wider justification. Review is an important factor in ensuring legality in the essential area of operation of the state administration and an effective instrument in protecting the interests of the citizens<sup>19</sup>.

In examining the constitutionality and legality of a regulation, it must be established whether: a) the regulation was passed under an express (not only presumed) delegation of a statute; b) in terms of the object and content of the regulated relations, the regulation falls within the limits of the delegation granted by the lawmaker to issue such an act; c) the regulation contravenes the piece of legislation on the basis of which it is issued and the content of other legislation. The constitutionality of a regulation is also conditional on the statement that it is issued not only in accordance with the provisions of the statute on which it is based, but also with all the remaining body of legislation directly or indirectly regulating the content of the regulation<sup>20</sup>.

### Freedom of a man as a base of compliance with the law. The characteristic of protection of freedoms and rights of individuals as a fundamental element of law in the order of a rule of law state

From the standpoint of the anthropological requirement, the thought was expressed that, in order to achieve the subordination to law (compliance with law), the free and conscious man must appear. This feature of free and sensible subjection to law is not noticed in case of slaves (who were used as tools). Therefore, as was marked by Francesco Viola, the rule of law implicates mostly that the law is not the feature of the society of slaves. In case of freedom of citizens, the principle of rule of law expects that the law will be understood as a common enterprise of the legislator, these who exercise law and citizens. Within this cooperation every subject has its own function i.e. defining some general, allowing action norms, then interpreting and applying them, and finally taking these rules as indications of a conduct. In this view, the complementarity of law in relation to the rule of separation of powers is noticed<sup>21</sup>. It is important to emphasize a circumstance that the condition for the rule of law state, where the sensible compliance with law takes place, is freedom of

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<sup>19</sup> See: Decision CT-s dated 29 September 1993 (K.17/92) in: J. Oniszczyk, op.cit., p. 113–114; S. Biernat, *Rozdział dóbr przez państwo. Uwarunkowania społeczne i konstrukcje prawne*, [The Distribution of Goods by the State. Social Ramifications and Legal Constructions], Ossolineum, Wrocław 1989, p. 267.

<sup>20</sup> J. Oniszczyk, op.cit., p. 127.

<sup>21</sup> F. Viola, *The rule of Law in Legal Pluralism*, in: *Law and Legal Cultures in the 21<sup>st</sup> Century*, eds. T. Gizbert-Studnicki, J. Stelmach, Warsaw 2007, p. 105 and next and recalled P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, Public Law 1997, pp. 267–87.

a man, understood as a stance opposite to a position of a slave. It is understood that the invasion of law in the substance of civil spirit of an individual and its deprivation of basic content means simultaneously that the state departs from its legal version.

Assertion, that in the rule of law state, the law is over the people, not only takes up the problem that the formal indications, will of a sovereign or even the common will binding individual resulting from e.g. the social contract are insufficient for recognition of such "a thing" as a law. In this approach, such a thought saying that the will of the commonwealth binds individuals and moreover that such law will be obeyed<sup>22</sup>, does not seem to be sufficient for acknowledging that it is law of the rule of law state. Therefore, even if the law has certain substantial features of the law such as justice, understood as a social sense of fairness of general character (justice, integrity), it is still too little to determine the law of the order of rule of law state. In such a state important are freedoms and rights of individuals, so the law is directed toward protection of freedom and rights of individuals in the state. This law is not against society, nor the state but also not up to state's will, nor against different individuals nor according to their will. Thus, the law formally correct, supported by the will of the sovereign, expressing the general belief of its justice, is still not a law for the individual or a law embodying individual's will. It is still the law for the governors. Such legitimacy is not given by the democratic elections and electors since this way may only determine the bodies of the state's authority and next enacting of law on behalf of the state (even if it is accepted that this is the organization of certain society). Interests and rights of society in the democratic state may be expressed by its bodies in the election; however, in such a way the equally important interests and freedoms of individuals are not expressed. Even though because the large number of individuals does not make a society. And the individual, despite of his social character is fundamentally not a reduced society. The individual is characterized by certain (but limited) autonomy ("sovereignty") in relation to society and its organizational forms including the state. The rule of law may take place even when the formula of the state's bodies acting "based and within the limits of legal regulations" is remained, because still the will and desire of "power" may be present, without considering the sense of law, which notices also a goal of the law absorbing not only the conduct but also the improvement of man's freedoms. There is no law when the man's freedom is not retained<sup>23</sup>. That is why, not only the arbitrary acts of the public government are not allowed (forbidden), political decisions of parliament as well as the decisions on the usage of the law, but also the freedoms and rights of individuals should be

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<sup>22</sup> J. J. Rousseau, *Remarks on Polish government*, in: *Social contract*, Warsaw, 1966, p. 51.

<sup>23</sup> *Ibidem*, p. 187.



considered. For that reason, the constitution and institutions which secure it (e.g. the system of constitutional courts) do not solve especially the problem of arbitrariness: 1) substantial of the legislator, in case when the constitutional control has a formal character, 2) formal of the legislator, when the constitutional control has the substantial character, 3) formal and substantial constitutional control when the control is formal and content related. In any case, the constitutional court, testing itself by verification of its rulings, which formally control the constitutionality, in case of substantial integrity may only try to justify its reaction, stating that it will determine substantial discrepancies of the regulation against the constitution, only when such a discrepancy is especially grave or glaring. In any case, it does not exclude possibility of “the oppression on behalf of the law”<sup>24</sup>.

The foregoing indicate that the contemporary understanding of law (rule of law state) is not equal to the law of such a state in the traditional version of *Rechtsstaat* “which includes political rights of citizens, guaranty of the private property, courts’ independence, action of the public administration based on legal regulations which implicate the judicial control over administration and equality before the law”<sup>25</sup>. With this new conception of a law of the rule of law state are associated not only mentioned political and civil rights but also economic and socio-cultural rights. In connection with aforesaid, the question arises: whether the universalization of political and socio-economical rights of individuals, has in fact concluded its “long historical process in which people become equal participants of their societies” what was predicted by T. H Marshall<sup>26</sup>.

## Catalog of principles of rule of law state. General remarks

### Introduction

The rule of law state, generally speaking, is described as a state which action is based on law but also as a state which guarantees that the law is obeyed by all subjects active within the territory of state’s jurisdiction. The rule of law state is characterized by the number of principles. They concern enactment of law, its exercise as well as content of public law and content of guaranteed private law i.e. rights and obligations of parties in the field of the private law.

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<sup>24</sup> G. Sartori, *Theory of the democracy*, Warsaw 1994, pp. 400–402.

<sup>25</sup> K. Frieske, *Sociology of law*, Polskie Wydawnictwo Prawnicze Iuris, Warsaw 2006, p. 262.

<sup>26</sup> *Ibidem*, p. 268.



Robert von Mohl, who was inspired by projects of John Locke and Georg W. Hegel, tried to name the set of principles of the rule of law state (viewed as a measure which serves to a man, not opposite). This philosopher noticed features of rule of law state emphasizing these which concern: 1) authority's attributes and 2) rights of individuals and their organizations. When it comes to characteristic of the authority (annotation 1) he found that the public authority: a) has jurisdiction over all citizens and their organizations so they may be "obedient to the rules of the organization" (constitution); since the goal of the state is an equal support of its citizens, the citizens should also have equal duties toward the state; b) may use any means that serve to the state's goal, which comply with the law c) decides if the individual expectations of support are related to the important and general interests so it is justified to use common goods (the state should settle the conflict by giving the priority to the common, not individual good). Among so called human rights (annotation 2) which have to cumulatively appear with this first type of rights, there are rights: a) political, b) civil and private. First of all, the thinker distinguished equality before the law, with no regard to personal characteristics, social status and freedom in achieving own goals as long as it does not violate rights of other people and the durability of the institution of the state. In the sphere of the civil law *sensu stricto* he located: 1) right to the durable residency within the state in the freely chosen place (there is related duty of not expelling citizens from the state except certain circumstances and the right of a man to emigration), 2) right to participation in benefits produced by the state with preservation of the conditions of the common good for the largest group of citizens and then smaller groups of citizens and moreover, on the one hand not to sacrifice current goals for the future generations, on the other not to deprive the further generations from means allowing them to exist, 3) the right for the personal development and assembly (which included: a) freedom of occupation, b) physical and intellectual development, c) freedom of free expression and to know opinions of others, d) freedom of religion, e) free formation of associations which pursue legal private interests, 4) personal freedom (which means permissibility of arrest, frisk, control of correspondence, only in accordance with regulations), 5) safety of the property against its arbitral and unjust limitation by the state, 6) right to file "a complaint about not fulfilling justified demands or about tolerance for factual unfairness". When it comes to the political rights, they were related to exercising of governmental power (legislative) and control over government. Among these rights was ability to: a) hold (exercise) an office, b) active and passive participation in formation of representations<sup>27</sup>. It should be added here that the rule of equality before

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<sup>27</sup> R. von Mohl, op.cit., pp. 199–209, 279–284.

the law (and equality of electoral rights, which are significant here) were not limited by any condition e.g. property census.

The significant topicality of these rules is noticed, even because of their presence in constitution of democracies on the beginning of the XXI century. Other conditions of the lawful state are: conduct based on law in accordance with constitution and guarantying dignity and human rights, justice and legal certainty<sup>28</sup>.

### The principle of confidence of an individual in law and in the law-enacting state. Detailed rules of the general principle of confidence

The rule of law embodies maintaining the confidence of citizens in the state. The special significance of the principle of confidence in the state and law enacted by the state is indicated by the constitutions of democratic states. In different proposals for "standard" rule of law state many principles are named, which have to be obeyed by the legislator, while the general principle of the confidence is commonly seen as the one which has to be fulfilled in order to determine whether the state is lawful. The traditional vision of the democratic rule of law state finds relation between the principle of confidence of a citizen in the state and the principle of the loyalty of the citizen to the state. The confidence of an individual in democracy is improved by the fulfillment of certain level of formal and material conditions. It is impossible to develop confidence to a disloyal democracy i.e. when the state e.g. produces law which is arbitrary, wrong, empty, does not secure people's improvement or safety or even endangers the certainty of existence of an individual. Real conduct and imagined possibilities of loyal democracy are the necessary conditions of obtaining the confidence of citizens by this democracy.

First of all, it must be noted that the principle of legal confidence is based on assumption of some certainty of law and on the predictable conduct of state's bodies. Especially, the issue is the protection of equitably granted (obtained) rights, effectiveness of law after enactment in future (*pro futuro*) and after it is accessible, which means non activity from the retroactive date (antedate of law) or finally proper (proportional) intervention in the socio-economic life of an individual. In case of such a condition in form of certainty of law, it was stressed that the law and the procedures of its stabilization are to be characterized by certainty and reasonable stability (relative invariability). It also means the predictability of the settlements regarding the legal position of an individual. This principle is based on the certainty of law, which

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<sup>28</sup> A. Bosiacki, *Introduction*, in: R. von Mohl, op.cit., p. XXXIV.

is understood as a set of features, which provide for legal safety of an individual – enable him to make decisions regarding his own conduct based on possibly full knowledge of premises of actions of state bodies as well as legal consequences of such actions. The individual should have ability to predict consequences of certain actions and occurrences on the ground of law binding in this certain time, as well as should have expectation that the legislator will not change law in arbitrary and sudden manner. With the certainty of law the rule of legal safety is associated, whereas the certainty of law means, not only the absolute stability (permanence) of legal regulations, but also conditions for the predictability of the conduct of state actors and related to them actions of citizens. Such understanding of predictability of the state's conducts guarantees confidence in legislator and in law enacted by lawmaker. Often the unavoidable increase of burden, which happens as a result of change of the law, should be done in a way giving individuals who are to be bound by such a law, time to rationally dispose of their interests. The legal safety of an individual related to legal certainty enables predictability of conduct of state's bodies and prediction of his own acts. In this way the following are fulfilled: a) the freedom of an individual who makes his decisions according to his preferences and takes responsibility for their effects b) his dignity through respect of the legal order for the individual viewed as an autonomous, rational existence. When the law is changed, these values are violated by the legislator if his decisions were not expected by an individual since he could not predict them under given circumstances, especially when the legislator may presume, while making his decisions, that if the individual had predicted that change of the law he would have made different decisions about his matters (interests). The certainty of law is understood here as a certainty of the fact that the citizen forms his life relations based on binding law. In this second meaning certain law (legal certainty) means also a just law. It may be said here that the citizen has also a right to be respected by the legislator. The respect for an individual who is autonomous and rational is demanded by his dignity and freedom. The following terms are important for understanding of discussed principle of confidence: "predictability" (the action of the public bodies) and "forecasting" (the circumstances proper for maintaining individual's own interests, so his dignity is preserved).

According to various legal concepts it is to human rationality should lead to the mentioned vision of confidence conditioned by notions like freedom, equality and dignity. For instance the approaches respecting the rational nature of a man consider that such a character of a man causes that he tries to know himself and his closer and farther surroundings. However, the condition of making a choice of practical character is his freedom and equality as an individual. The level of freedom and equality of formal, as well as substantial, character rises or reduces the scope of man's

responsibility for his own acts. As an effect, by aiming to settle his biological and civilization problems he inclines, or even in higher or lower level, he actively participates in formation of a social order. The law should not cause him any problems in this field as long as his goal is to build a common good or a fine self-realization. Here, the important measurement of such good is a protection of human dignity, which is understood as a due, equal respect which results from the essence of human nature<sup>29</sup>. The law should serve to the reason included in the Immanuel Kant's thought saying that the man should not be treated as a measure but as a goal. In this situation, for example, the instrumental character of the statutory law should serve to achievement of a goal which is a guarantee of a human dignity. Therefore, the regulation which does not meet the standard of utility of protection of human dignity may be found as a doubtful from the legal standpoint (the principle of confidence).

According the CT interpretation maintaining confidence in the state is – similar to substantive legality – a principle concerning constitutional law and, as such, it imposes certain obligations in the sphere of state activities. In the sphere of the state's lawmaking activity, it imposes an obligation to draft laws in such a way so that civil liberties are not restricted if it is not required by an important social or individual interest protected by the Constitution. Next, it places an obligation on the lawmaker to grant rights to citizens and guarantee their enforcement, to enact laws in a consistent and clear manner, intelligible to citizens and finally not to give retroactive effect to legal provisions. The maintenance of confidence in the state and social strength are based on nothing else but the stability. Thus, maintaining confidence in the state also becomes a basic value, referred to and protected by constitutional provisions, for the whole society<sup>30</sup>.

The especially significant detailed principles covered by the rule of law (and part of this principle i.e. principle of confidence) are among others: 1) the principle of certainty of law, 2) the principle of the transparency and of making law available to its addressees (accessibility of law), 3) the principle of clear formulation of the legal regulations, 4) the prohibition of retroactive application of law, 5) the duty of keeping an appropriate *vacatio legis* (a suitable adjustment of law), 6) the duty of duly formulation of so called temporary regulations, 7) the rule of loyalty of the state, 8) the principle of protection of rights equitably acquired, 9) the principle of sufficient specification, 10) the principle of proportionality of the conduct, 11) the rule of the conditional acceptance of the constitutional limitations of freedom and rights, 12) the principle of similar regulation of similar matters, 13) the principle of

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<sup>29</sup> A. Kość, *The fundamentals of the philosophy of law*, Lublin 2001, p. 193.

<sup>30</sup> J. Oniszczyk, *op.cit.*, p. 33.

the comparative durability of the imposed tribute, 14) the principle of not changing the amount of the tribute (fiscal) obligations within the fiscal year, 15) the principle of protection of so called pending interests, 16) the duty not to charge multiple times for the same offence, 17) the duty to realization of man's dignity and freedom, 18) The principle of the statutory legislation (and the system of law; the constitutional structure /sources/ of law.

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